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IN THE

Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,
Petitioners,
v.
RICHARD HODGES, Director,
Ohio Department of Health, *et al.*,
Respondents.

On Writs of Certiorari To the United States Court of Appeals For the Sixth Circuit

BRIEF OF *AMICUS CURIAE* BILAW IN SUPPORT OF PETITIONERS

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Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).....5, 7, 9, 31

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In re Marriage Cases, 183 P.3d 384 (Cal. 2008).....33

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J.E.B. v. Alabama, 511 U.S. 127 (1994).....26, 28

Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).....28

Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013).....30

Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).....5, 31

Latta v. Otter, 771 F.3d 456 (9th Cir. 2014).....2, 5, 7, 19-21, 24, 31

Lawrence v. Texas, 539 U.S. 558 (2003).....5, 32, 36

Loving v. Virginia, 388 U.S. 1 (1967).....28, 29, 34

McLaughlin v. Florida, 379 U.S. 184 (1964).....28

Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) 33

Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).....31

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal 2010).....31

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United States v. Virginia, 518 U.S. 515 (1996).....22, 34

United States v. Windsor, 133 S. Ct. 2675 (2013).....5, 7. 9. 14, 27. 35

Varnum v. Brien, No. CV5965. 2007 WL 2468667 (D. Iowa Aug. 30, 2007).....30

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).....30-31, 33

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).....34

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SECONDARY AND OTHER SOURCES

Apilado v. North American Gay Amateur Athletic Alliance Complaint, 2010 WL 1654117 (W.D. Wash.)..... 17

Bostic v. Schaefer Appellees Br. 2014 WL 1398088 (4th Cir.).....5, 7

Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012).....7

Bowers v. Hardwick Resp't Br., 1986 WL 720442.....5

Benedict Carey, *Straight, Gay, or Lying? Bisexuality Revisited*, N.Y. Times (July 5, 2005), http://www.nytimes.com/2005/07/05/health/05sex.html?_r=0.....11

Faith Cheltenham, *The Curious Case of Ivo Widlak*, Huffington Post Blog (Dec. 12, 2012), http://www.huffingtonpost.com/faith-cheltenham/the-curious-case-of-ivo-widlak_b_2317756.html.....15

Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127 (1993).....6, 11

Eliel Cruz, *When Bisexual People Get Left out of Marriage*, Advocate.com (Aug. 26, 2014), http://www.advocate.com/bisexuality/2014/08/26/when-bisexual-people-get-left-out-marriage.....8

Gary J. Gates, *LGBT Demographics: Comparisons Among Population-Based Surveys*, Williams Institute, http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf.....6, 10

.

Harassment of Bisexual Employee, Equal Opportunities Rev., Issue 212 (May 2011).....16

Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, AM. J. PUB. HEALTH, vol. 100, no. 3 (March 2010).....13

Mark L. Hatzenbuehler *et al., Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 SOCIAL SCIENCE & MEDICINE 33 (2014).....12-13

Gregory M. Herek, *Heterosexuals' Attitudes Toward Bisexual Men & Women in the United States*, 39 J. OF SEX RESEARCH 264 (Nov. 2002).....10

Hollingsworth v. Perry Oral Arg., http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144.pdf.....27

Hollingsworth v. Perry Resp't Br., 2013 WL 648742.....5, 7

Ivo Widlak Investigates, *Popular Chicago Journalist Facing Deportation Because of Bisexuality* (Sept. 26, 2013), http://ivowidlak.com/ivo-widlak-popular-chicago-journalist-facing-deportation-chicago-radio-media-tv/.....15

Maria L. La Ganga, *Oregon's New Governor Blazes a Trail in U.S.*, L.A. Times 1 (Feb. 19, 2015).....18

Latta v. Otter Appellees Br., Case No. 14-35420, Docket Entry 76-1 (9th cir.).....5, 7

Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, __ Mich. J. Gender & L. (forthcoming 2015).....5

Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty. Not "Argle Bargle": The Inevitability of Marriage Equality After Windsor*, 23 TUL. J. L. & SEXUALITY 17 (2014).....23, 35-36

Laura McClure, *Same-Sex Family Values, Salon Monday*, Oct 20, 2003, http://www.salon.com/2003/10/20/same_sex_marriage/.....24-25

Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification*, 10 BERKELEY WOMEN'S L.J. 98 (1995).....6, 11

Justin Reinheimer, *Same-Sex Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis*, 21 BERKELEY J. GENDER L. & JUST. 213 (2006).....29-30

Romer v. Evans Resp't Br., 1995 WL 17008447.....5, 7-8

Lori E. Ross *et al.*, *Perceived Determinants of Mental Health for Bisexual People: A Qualitative Examination*, AM. J. PUBLIC HEALTH, vol. 100, no. 3 (March 2010).....13

San Francisco Human Rights Comm'n LGBT Advisory Committee, *Bisexual Invisibility: Impacts and Recommendations* (2011), http://sf-hrc.org/sites/sf-hrc.org/files/migrated/FileCenter/Documents/HRC_Publications/Articles/Bisexual_Invisiblity_Impacts_and_Recommendations_March_2011.pdf.....10, 12-13

Ann E. Tweedy and Karen Yescavage, *Discrimination Against Bisexuals: An Empirical Study*, WILLIAM & MARY J. OF WOMEN & THE LAW (forthcoming 2015) 16

United States v. Windsor Resp't Br., 2012 WL 3900586.....5, 7-9

Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).....6, 11

INTEREST OF AMICUS CURIAE

Amicus curiae is BiLaw, a group of professors and practitioners of law who specialize in gender and sexuality, including the discrimination faced by and the rights afforded to bisexuals, and many of whom identify as bisexual.[1] *Amicus* has an interest in this Court's consideration of the extent of the right to same-sex marriage and the inclusion of bisexuals as holders of such a right. *Amicus* submits this brief to provide the Court with the history of bisexual invisibility—even in the context of laws meant to protect gays and lesbians—and to provide the Court with the legal justifications for framing a right to same-sex marriage in such a way that explicitly includes and protects bisexuals.

SUMMARY OF ARGUMENT

Demographic data consistently demonstrate that bisexuals constitute more than half of the lesbian, gay, bisexual and transgender populace. Bisexuals' existence, however, is not reflected in litigation for the rights of lesbian, gay. and bisexual people. Starting with *Romer v. Evans*, 517 U.S. 620 (1996), federal courts and litigants have generally omitted mention of bisexuals in defining the class of individuals affected by same-sex marriage bans and other forms of laws targeting lesbian, gay. bisexual.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, its counsel, or their employers, made any monetary contribution toward the preparation or submission of this brief. All counsel of record have consented to the filing of this brief. Some of the members of *amicus* are listed in Appendix A.

and transgender ("LGBT") individuals.[2] Outside the context of litigation, however, academics and activists have become increasingly aware of the harms of bisexual exclusion from LGBT-rights discourse and have begun to make more of an effort to be inclusive of bisexuals. In the context of marriage, bisexuals, like gay men and lesbians, are harmed when their same-sex relationships are deemed unworthy of equal marriage rights and responsibilities, or when their same-sex marriages are denied equal recognition.

Amicus urges this Court to return to the inclusive terminology previously used in cases such as *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and by Judge Berzon of the Ninth Circuit in her recent *Latta v. Otter* concurrence, acknowledging the existence of bisexual people. 771 F.3d 456, 482 & n.5, 495 (9th Cir. 2014) (Berzon, J., concurring). *Amicus* thus urges the Court to use, in addition to the phrase "same-sex couples," the phrase "gay and bisexual couples" (rather than "gay and lesbian") because it is a more accurate and inclusive descriptor of the

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[2] "LGBT" is the inclusive acronym referencing both sexual orientation and gender identity minorities, i.e., lesbians, gays, bisexuals, and transgender individuals. This brief uses the acronym of "LGBT" to refer to the group of individuals burdened by laws barring same-sex marriage because transgender individuals may identify as lesbian, gay or bisexual, or may be discriminated against because they are perceived to be in same-sex relationships. Moreover, the brief uses "gay" to refer to both gay men and lesbians. As suggested herein, "gay and bisexual" is a more accurate and inclusive umbrella phrase to capture all individuals of non-heterosexual orientation than "gay and lesbian."

individual members of the affected class in this case and because failing to accurately describe the class will lead to incorrect and harmful results in these cases as well as future cases.

Bisexuals play a particularly unique role in this Court's equal protection analysis. Specifically, bisexuals illustrate that the denial of marriage equality is primarily based on the gender of one's partner, rather than one's sexual orientation. As a result, the proper standard of review for the marriage bans at issue in this case is at least intermediate scrutiny. Although *amicus* agrees with other marriage equality advocates that legal categories based on sexual orientation should be subject to strict scrutiny, *amicus* urges that if strict scrutiny is held inapplicable, the Court must apply heightened scrutiny because same-sex marriage bans unconstitutionally categorize on the basis of gender.[3] Under that review, the Court should strike down same-sex marriage bans.

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[3] In this brief, *amicus* addresses only the equal protection doctrine as it applies to sex discrimination because our central contention is that bisexuals present a unique and salient illustration of how marriage bans are, at their core, sex discrimination. The brief's sole focus on equal protection and sex discrimination is *not* a rejection of other grounds on which the marriage bans must fall, such as a fundamental due process right to marry the person of one's choice and the equal protection analysis that the bans also discriminate on the basis of sexual orientation and must fall under any level of scrutiny. Rather, *amicus* agrees with these alternative analyses—and contends that none of them is inconsistent with the arguments made by *amicus* herein—but focuses solely on equal protection sex discrimination because of its saliency to bisexuality and its power to reverse bisexual erasure.

To be bisexual-inclusive is to recognize that, like gay men and lesbians, many bisexuals enter into lifelong same-sex partnerships, raise children with their same-sex partners, and are equally affected by the denial of equal marital rights and protections for their families. Bisexuals should be acknowledged within LGBT-rights cases because they are affected deeply by the issues at stake in these cases as well.

ARGUMENT

I. Bisexual Erasure and the Importance of Bisexual Inclusion in Same-Sex Marriage Jurisprudence

In recent years, bisexuals have all but disappeared from the face of LGBT-rights litigation. In marriage equality cases in particular, bisexuals have been rendered largely invisible, even though the denial of marriage equality is just as harmful to bisexuals who are in same-sex partnerships as it is to gay men and lesbians. Almost without exception, however, gay men and lesbians have been the exclusive focus of cases addressing sexual orientation discrimination and discrimination against same-sex couples. Indeed, the rights of same-sex couples are described solely in terms of "gays and lesbians" in many court opinions, without mention that bisexuals also are harmed by same-sex marriage bans.

The importance of bisexual inclusion is manifold, with various potential harms arising from the invisibility of bisexuality in LGBT-rights discourse, as described below.

A. The Troubling History of Bisexual Invisibility in LGBT-Rights Litigation

In litigation affecting gay and bisexual individuals, there has been an unfortunate trend of bisexual exclusion from briefings and court opinions. For example, there was not a single reference to bisexuals in the language of the majority opinions in the following cases addressing same-sex marriage or other rights of gays and bisexuals: *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (majority opinion); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Romer v. Evans*, 517 U.S. 620 (1996); and *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled, *Lawrence v. Texas*, 539 U.S. 558 (2003). For the most part, the terminology of the majority opinions in these cases mirrored the briefing of the LGBT-rights attorneys, who similarly excluded bisexuals. *See Windsor* Resp't Br., 2012 WL 3900586; *Perry*, Resp't Br., 2013 WL 648742; *Latta*, Appellees Br., Case No. 14-35420, Docket Entry 76-1; *Bostic*, Appellees Br. 2014 WL 1398088; *Romer*, Resp't Br., 1995 WL 17008447; *Bowers*, Resp't Br., 1986 WL 720442. *See also* Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation*, __ MICH. J. GENDER & L. (forthcoming 2015) (tracking bisexual invisibility within nomenclature in LGBT-rights cases) (on file with author).

The invisibility of bisexuality in LGBT-rights discourse is not attributable to bisexuals'

nonexistence; in fact, some surveys show that bisexuals constitute over half of the gay and bisexual population. For example, in surveys of adults aged 18-44 who identify as lesbian, gay or bisexual by the National Survey of Family Growth, 2.6% out of 4.1% identified as bisexual; in General Social Surveys, 2.5% of 4.2% identified as bisexual; and in National Health Interview Surveys, 1.0% of 2.8% identified as bisexuals. Gary J. Gates, *LGBT Demographics: Comparisons Among Population-Based Surveys*, Williams Institute, http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf, at 4.

This discrepancy between the relatively large size of the bisexual population and their comparative invisibility in LGBT-rights discourse has led to a scholarly examination of bisexual invisibility, also termed "bisexual erasure." Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 361, 363-88 (2000); *see also* Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification*, 10 BERKELEY WOMEN'S L.J. 98 (1995); Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127-28, 136-37 (1993). While there are various forms of bisexual erasure, the more benign and common forms (as compared to the more deliberate delegitimizing stigmatization of bisexuals), as described by Yale Law Professor Kenji Yoshino, are categorical class erasure (bisexuality categorically does not exist) and individual erasure (bisexual individuals are described by others as being gay rather than bisexual). Yoshino, *supra*, at 395-99.

While bisexual (in)visibility has been the subject of legal scholarship, bisexuality is rarely mentioned in litigation involving LGBT rights. Among federal appellate decisions, there has been only one written opinion substantively addressing the rights of bisexuals. *See Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984) (reversing district court's holding that plaintiff was improperly terminated after coming out as bisexual). Otherwise, there has been a near-total lack of reference to bisexuals in briefs and opinions in LGBT-rights cases. In marriage equality litigation specifically, bisexuals have been "virtually invisible." Michael Boucai. *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 453 (2012); *see also generally Windsor*, *Perry*, *Latta*, and *Bostic* (failing to mention bisexuality in briefs or majority opinions).

The courts are not solely to blame for omitting reference to bisexuals; it is understandable that courts followed the lead of advocates who have framed the claims of members of partnerships seeking marriage equality as "gays and lesbians," not "gays and bisexuals" (or "gay men, lesbians, and bisexuals"). *Romer v. Evans* provides an example of the courts mirroring the bisexual erasure of LGBT-rights litigants. In that case, although the language of the Colorado Amendment ruled unconstitutional by this Court explicitly included bisexuals, the parties challenging the amendment dropped all references to bisexuals from their briefing. *Compare* Colo. Const. art. II, § 30b (prohibiting "Protected Status Based on Homosexual, Lesbian or Bisexual Orientation"), *with Romer* br. for respondents, 1995

WL 17008447. This Court followed in kind, describing the class in that case as "homosexual persons or gays and lesbians." *Romer*, 517 U.S. at 624.

The media has compounded the problem of bisexual erasure, for example reporting that marriage equality litigant and prominent bisexual activist Robyn Ochs is lesbian, not bisexual. *See* Eliel Cruz, *When Bisexual People Get Left out of Marriage,* Advocate.com (Aug. 26, 2014), http://www.advocate.com/bisexuality/2014/08/26/when-bisexual-people-get-left-out-marriage. Upset by the erasure of her identity, Ochs has explained, "My identity is hard-won—I worked very hard and for a very long time to come to a place of comfort and pride about who I am, and it matters to me that people see me accurately." *Id.*

In Supreme Court jurisprudence, however, bisexual exclusion has not always been the case. Before *Romer*, in the 1995 case *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, the party's name explicitly referenced bisexuals. Thus, the tone was set for this Court to similarly be bisexual-inclusive, and it was, mentioning bisexuals frequently throughout the *Hurley* majority opinion. However, this bisexual inclusivity was short-lived. A year later, the bisexual erasure within the *Romer* briefs and majority opinion marked the beginning of the post-*Romer* era of bisexual invisibility in Supreme Court litigation. Other than in the context of quoting the Colorado Amendment's text in *Romer*, the word "bisexual" has

not appeared in a single majority opinion by this Court since *Romer*.

That said, in *Windsor* and *Perry*, this Court's language reflected a greater degree of inclusivity than in the plaintiff-appellants' own briefings. In those majority opinions, this Court frequently described the pertinent class as "same-sex couples" rather than the less-inclusive phrase "gay and lesbian," which permeated the plaintiff-appellants' briefs. While their briefs on the merits contained hundreds of references to "gays," "homosexuals," or "gays and lesbians," there was not a single reference to bisexuals in the body of any of these briefs, other than in a footnote of Windsor's brief referencing an expert statement regarding the immutability of "gay, lesbian, and bisexual" sexual orientations. *See Windsor* Resp't Br., 2012 WL 3900586, at *25 n.16. Other than that passing citation, the merits briefs failed to explain that bisexuals, like gay men and lesbians, are harmed by same-sex marriage bans.

By employing the nomenclature of "same sex couples" rather than "gay men and lesbians," this Court commendably, if implicitly, shifted the discourse in a more accurate and inclusive direction. *Amicus* urges the Court to continue in this direction by not only continuing to use umbrella phrases such as "same-sex couples" over less inclusive phrases such as "gay and lesbian couples," but also by explicitly recognizing and stating that same-sex couples do, in fact, include bisexuals. The failure to do so will contribute to the ongoing serious harms caused by bisexual exclusion.

B. The Harms of Bisexual Exclusion

While bisexual erasure may, at first glance, appear to be relatively innocuous, it is not. The erasure perpetuates the common but erroneous views that (1) bisexuals have little or nothing at stake in LGBT-rights struggles, and (2) bisexuals do not face discrimination based on their bisexuality. In reality, research confirms that the stigmatization of bisexuals is *greater* than that of homosexuals. *See* Gregory M. Herek, *Heterosexuals' Attitudes Towards Bisexual Men & Women in the United States*, 39 J. OF SEX RESEARCH 264, 268 (Nov. 2002) (noting heterosexuals rated bisexuals as the second lowest group among a variety of political, racial, ethnic, religious, and social groups, with only injecting drug users receiving a less favorable rating); San Francisco Human Rights Comm'n LGBT Advisory Committee, *Bisexual Invisibility: Impacts and Recommendations* (2011), http://sf-hrc.org/sites/sf-hrc.org/files/migrated/FileCenter/Documents/HRC_Publications/Articles/Bisexual_Invisiblity_Impacts_and_Recommendations_March_2011.pdf. When this stigmatization is coupled with the data showing that bisexuals are the largest group in the LGBT community, the magnitude of the harm caused by erasure becomes apparent. *See* Gates, *supra*. Bisexuals are directly harmed by the implicit invalidation of their lived experiences. Moreover, the erasure creates additional harm, namely harm promulgated by others, who believe bisexuality is irrelevant, and whose belief is reinforced by the erasure, for example in court briefings. The compounding of the erasure enables various types of harms to bisexuals, described below.

1. *The General Harm of Bisexual Stigmatization*

Erasure of bisexuals, whether intentional or unintentional, is a form of discrimination against bisexuals that causes serious harm to bisexuals. In his article coining the phrase "bisexual erasure," Professor Yoshino observed that "self-identified straights and self-identified gays have shared political interests that lead them to engage in strategies, consciously or unconsciously, that erase bisexuality." Yoshino, *supra*, at 399. This is due in part to negative (and inaccurate) stereotypes associated with bisexuals, such as perceptions that they are immature, unfaithful, and indecisive—if not outright fictitious. *See, e.g.*, *id.* at 395-99 (describing and compiling examples of "categorical class erasure" of bisexuals by those who contend bisexuality doesn't exist; "individual erasure" of those who come out as bisexual by re-labeling them with another sexual orientation; and bisexual erasure through delegitimization via disparaging stereotypes such as the abovementioned ones); Benedict Carey, *Straight, Gay, or Lying? Bisexuality Revisited*, N.Y. Times (July 5, 2005), http://www.nytimes.com/2005/07/05/health/05sex.html?_r=0. In the lesbian community, bisexual women who date men have even been condescendingly dismissed as "hasbians."[4]

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[4] "There is, in fact, a word for traitors: hasbians. It is a powerful pun that invokes the abyss of not being what you had been thought to be, of really being nothing." Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. at 117 (1995). *See also* Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY at 129 (describing being called a "hasbian" after marrying a man).

When court opinions, like the *Romer* opinion, omit bisexuals despite the fact that their rights are explicitly at stake, LGBT-rights discourse is framed to suggest that bisexuals' rights and lived experiences are not important in comparison to those of gay men and lesbians—or even that there is something shameful and less acceptable about bisexual people that necessitates keeping their presence hidden. Moreover, this erasure is not the result of an evidence-based determination about the merit of particular claims by individual bisexuals or the likelihood that bisexuals would be discriminated against under the law, such as Amendment 2 in *Romer*. Instead, the distinction is class-wide without regard for the merit of any individual claim.

The pervasive erasure of bisexuality in LGBT-rights advocacy, in court opinions, and elsewhere likely contributes to the increased health and mental health problems that bisexuals experience compared to gay men and lesbians. Specifically, bisexual men and women have much higher rates of suicidal ideation than gay men and lesbians respectively. *See Bisexual Invisibility: Impacts and Recommendations*, at 12. Additionally, the data indicate that bisexual women are more likely to experience frequent mental distress than lesbians and that they have poorer general health than lesbians. *Id.* at 11-12. The concept of "minority stress" and the relationship between discrimination against LGBT persons and mental and physical health detriments is well-documented. Mark L. Hatzenbuehler *et al.*, *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 SOCIAL SCIENCE & MEDICINE 33 (2014) (reporting

that the life expectancy of sexual minorities living in communities with high levels of anti-gay prejudice is twelve years shorter than for those living in low-prejudice communities); Lori E. Ross *et al.*, *Perceived Determinants of Mental Health for Bisexual People: A Qualitative Examination*, AM. J. PUBLIC HEALTH, vol. 100, no. 3, at 497 (March 2010) (detailing bisexual participants' perception that biphobia and monosexism played critical roles in their mental health experiences); Mark L. Hatzenbuehler *et al.*, *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, AM. J. PUB. HEALTH, vol. 100, no. 3, 452 (March 2010) (reporting increased rates of psychiatric disorders, especially mood disorders and generalized anxiety disorder, among LGBT respondents living in states that passed anti-marriage equality constitutional amendments). Researchers theorize that the worse mental health outcomes for bisexual people compared to lesbians and gay men are likely related to the fact that membership in the LGBT community is a protective factor for lesbians and gay men, insulating them from the experiences of discrimination they may face from the heterosexual world. *See Bisexual Invisibility: Impacts and Recommendations* at 12. Bisexuals, however, face consistent prejudice and exclusion from both the heterosexual and gay communities, and lack the same protective sense of community when faced with bias and discrimination.

To avoid further stigmatizing bisexual people as unworthy of acknowledgement or inclusion within the LGBT community, the Court should use bisexual-

inclusive language in its opinions in cases that affect the rights of bisexual people. *See Windsor*, 133 S. Ct. at 2692 ("[Marriage] is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.") By doing so, the Court will model for the rest of society that bisexuals both exist and are entitled to fair treatment.

2. *Harms to Bisexuals in Other Legal Contexts*

Using language in LGBT-rights cases that excludes bisexuals will contribute to collateral harms to bisexual people in future cases. This is because lack of mention of bisexual interests perpetuates the general lack of understanding among judges and juries as to what bisexuality is and how discrimination against bisexuals occurs. Given that the right to marry has far-reaching effects in family law, immigration law, and elsewhere, if the right to marry is framed in a way that excludes bisexuals, it may be unclear in future cases whether discrimination against bisexuals is permissible.

For example, in *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1239 (9th Cir. 1975), the immigration board determined that an applicant's marriage must be a sham. Petitioner was asked "an inordinate number of questions concerning [his] homosexuality"; the INS never considered bisexuality as a possibility. Instead, it ruled against the petitioner because it perceived a conflict between his past homosexual relationships and his present opposite-sex marriage; that "conflict" was so suspect as to render the marriage a sham in the court's mind. This case

illustrates the problem with sexual orientation being viewed as a binary—either exclusively heterosexual or exclusively homosexual—thus ignoring that bisexuals get married too.[5]

Bisexuals, like gays and lesbians, have also been discriminated against in the adoption context. *See, e.g., In the Matter of the Appeal in Pima County Juvenile Action B-10489,* 727 P.2d 830 (Ariz. 1986) (holding discrimination based on bisexuality permissible in adoption context). Similar discrimination against bisexuals has occurred in other family law cases. *See, e.g., S.B. v. L.W.*, 793 So. 2d 656, 661 (Miss. App. 2001) (denying mother custody, holding "mother's bisexual lifestyle" was indicative of her "lack of financial and emotional stability," as compared to the stable environment the father offered, including "a traditional family environment"); *Dorn v. Dorn*, 724 So. 2d 554, 556 (Ala. App. 1998) (denying custody to mother, court quoted guardian ad litem report describing mother as lacking stability, in part because she "engaged in a lesbian relationship while the minor children were in close vicinity" and also "had sexual relations with a man prior to obtaining a divorce from the [father]"). When this Court affirms that a lesbian, gay, or bisexual person has the right to marry the person of her choice, this will have ripple effects in other

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[5] For a more recent example, see Ivo Widlak Investigates, *Popular Chicago Journalist Facing Deportation Because of Bisexuality* (Sept. 26, 2013), http://ivowidlak.com/ivo-widlak-popular-chicago-journalist-facing-deportation-chicago-radio-media-tv/; Faith Cheltenham, *The Curious Case of Ivo Widlak*, Huffington Post Blog (Dec. 12, 2012), http://www.huffingtonpost.com/faith-cheltenham/the-curious-case-of-ivo-widlak_b_2317756.html.

family law contexts including adoption, foster care, and child custody, because affirming the right to marry negates arguments that a person may be an unfit parent based on sexual orientation alone. However, if opinions on same-sex marriage are framed in a way that implicitly exclude bisexuals, such opinions will not send a clear message to lower courts that discrimination against bisexual parents is unfair and presumptively unlawful, and bisexual parents could continue to be singled out for discrimination in future cases relating to adoption, foster care, and custody. This would be unacceptable, and the Court should take care, through careful drafting, to foreclose such a possibility.

Bisexual litigants face considerable barriers in accessing justice in the employment context as well. In the United States, no bisexual plaintiff has ultimately prevailed in a case alleging employment discrimination based on sexual orientation or raising a related claim.[6] *See Rowland*, 730 F.2d 444 (reversing district court ruling that plaintiff was discriminated against for coming out as bisexual). Furthermore, in a federal district court case brought by bisexual plaintiffs who alleged exclusion by an

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[6] The only case located by counsel in which a bisexual employee ultimately succeeded on the merits in a sexual orientation-based discrimination case was a harassment case from the United Kingdom. *See Harassment of Bisexual Employee*, Equal Opportunities Rev., Issue 212, at 29 (May 2011) (citations omitted); *see also* Ann E. Tweedy and Karen Yescavage, *Discrimination Against Bisexuals: An Empirical Study*, __ WILLIAM & MARY J. OF WOMEN & THE LAW (forthcoming 2015) at 12-14; 14, n.45, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1103720.

LGBT non-profit acting as a public accommodation, the judge failed to understand that the organization's facially discriminatory rules harmed bisexuals in contravention of its own professed mission. *Apilado v. North American Gay Amateur Athletic Alliance*, 2011 WL 5563206, at *1-*3 (W.D. Wash. Nov. 10, 2011) (failing to mention claim that defendant discriminated based on bisexuality in order granting partial summary judgment to defendant, instead framing the issue as whether the NAGAAA had a right to exclude "straight or closeted players" or "people who chose not to identify as predominantly interested in the same sex"). In light of the considerable obstacles that bisexuals face in accessing justice, the Court is in a position to effect considerable progress simply by using inclusive language in its marriage equality opinions. We urge it to do so.

C. This Court Should Include Bisexuality in its Terminology to Prevent Present and Future Harm to Bisexual Litigants

In recent years, LGBT-rights advocates have begun to recognize the problematic nature of bisexual exclusion, and have become more bisexual-inclusive in their terminology. For example, in 2010 the National Center for Lesbian Rights represented a group of bisexual softball players challenging their exclusion from the Gay Softball World Series tournament for not being "gay enough." *Apilado v. North American Gay Amateur Athletic Alliance*, Complaint, 2010 WL 1654117. The case settled after the North American Gay Amateur Athletic Association agreed to change its rules to explicitly

permit bisexual and transgender players to participate in the league. The National LGBT Bar Association has also facilitated bisexual inclusion by hosting the "BiLaw" organization's inaugural National BiLaw Caucus in 2014. *See* http://lgbtbar.org/annual/program/friday-august-22-2014/. The National LGBT Bar Association also recently changed its name from the less inclusive "Lesbian and Gay Bar Association," joining a number of other national organizations that have recently changed their names to become more bisexual- and transgender-inclusive, such as the ACLU's former Lesbian and Gay Rights Project, renamed the LGBT Project; the National Gay and Lesbian Task Force, renamed the National LGBTQ Task Force; and Parents, Families and Friends of Lesbians and Gays, renamed PFLAG. Very recently, the media also has begun to be more inclusive of bisexuals. *See, e.g.*, Maria L. La Ganga, *Oregon's New Governor Blazes a Trail in U.S.*, L.A. Times 1 (Feb. 19, 2015) ("Kate Brown made history in more ways than one Wednesday, when she was sworn in as Oregon's new governor while her mother and husband stood proudly by. . . . Brown also became the first openly bisexual governor in the U.S. In doing so, she kicked off a conversation about a slice of America that is often stigmatized and misunderstood.").

Amicus implores this Court to similarly adjust its language to reflect greater inclusivity. To be bisexual-inclusive is to recognize that, like gay men and lesbians, many bisexuals enter into lifelong same-sex partnerships, raise children with their same-sex partners, and are equally affected by the denial of equal marital rights and protections for

their families. It is thus discriminatory to render bisexuals invisible from the face of LGBT-rights litigation. Bisexuals should be acknowledged within LGBT-rights cases because they are affected deeply by the issues at stake in these cases as well.

As discussed above, this Court has been commendably more inclusive in its terminology in recent cases addressing marriage equality by employing the umbrella terms "same-sex" couples and "same-sex" marriage. To be more explicitly inclusive, this Court could follow the example of Ninth Circuit Judge Berzon, who recognized that bisexuals, too, are affected by same-sex marriage bans, not just gay men and lesbians. As Judge Berzon wrote in her concurrence to *Latta v. Otter*:

> The need for such a presumption, as to a factor that does not appear on the face of the same-sex marriage bans, suggests that the gender discrimination analysis is, if anything, a closer fit to the problem before us than the sexual orientation rubric. While the same-sex marriage prohibitions obviously operate to the disadvantage of the people likely to wish to marry someone of the same gender—i.e. lesbians, gay men, *bisexuals, and otherwise-identified persons with same-sex attraction*—the individuals' actual orientation is irrelevant to the application of the laws.
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> . . .

> I do not mean, by presenting this alternative analysis, to minimize the fact that the same-sex marriage bans necessarily have their greatest effect on lesbian, gay, bisexual, and transgender individuals. Still, it bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.
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> . . .
>
> I do recognize, however, that the gender classification rubric does not adequately capture the essence of many of the restrictions targeted at lesbian, gay, and bisexual people.

Latta, 771 F.3d at 482 & n.5, 495 (Berzon, J., concurring).

Amicus respectfully requests that this Court acknowledge that marriage is a fundamental right, not just for heterosexuals and gays, but for bisexuals as well, who are greater in number than gays, and who also enter into same-sex partnerships, but are rarely explicitly recognized as being similarly situated. This Court can increase the inclusivity and accuracy of its language by continuing to use umbrella phrases such as "same-sex couple," "lesbian, gay, and bisexual," or even "gay and bisexual" (with "gay" encompassing gay men and women) and by noting explicitly that "same-sex couples" and "same-sex marriages" include bisexuals.

Acknowledging the existence of bisexuals and the impact of these issues on their lives is critical for a coherent, consistent, and honest jurisprudence.

II. Denying Bisexuals Marriage Equality Is Sex Discrimination and Requires Heightened Scrutiny

Same-sex marriage bans violate equal protection because they constitute sex discrimination. Bisexuals play a unique role in the Court's equal protection analysis, a role that has not been brought to the Court's attention by the parties: this *amicus* brief thus fills a unique and important gap in the briefing in the present cases. SUP. CT. R. 37.1.

The lived experience of bisexuals saliently illustrates that the denial of marriage equality is, at its core, sex discrimination. For bisexuals in States with same-sex marriage bans, it is the gender of the person we choose to spend our life with that determines whether we have marriage rights. If we seek to marry a person of a different sex, we have full rights. If we seek to marry a person of the same sex, we have no rights. Our sexual orientation did not change; only the sex of our partner was different. As Judge Berzon pointed out, the sex discrimination analysis is a closer fit for the issue of same-sex marriage than the sexual orientation rubric. *Latta*, 771 F.3d at 482 & n.5, 495 (Berzon, J., concurring). For bisexual people in particular, the sex discrimination framework also more accurately describes the harm caused by same-sex marriage bans. For this reason, *amicus* urges that the Court recognize that the marriage bans at issue in these

cases constitute sex discrimination as well as sexual orientation discrimination.

Under firmly established precedent, classifications based on sex—where a law treats persons in similar situations differently on the basis of sex—trigger intermediate scrutiny; sex is a quasi-suspect classification under existing law. *United States v. Virginia*, 518 U.S. 515, 519 (1996). Because bisexuals are in the unique position of having the authentic opportunity to fall in love with a man *or* with a woman, they are uniquely situated in the marriage equality analysis generally and in the sex-discrimination analysis in particular: A bisexual's right to marry hinges solely on the gender of their chosen future spouse. The application of the sex-discrimination framework thus explicitly includes and reflects the lived experiences of bisexuals. This framework allows the Court to focus on whether the law treats persons in similar situations differently on the basis of sex (it does), and whether that classification is substantially related to an important government interest (it is not).

A. Bisexual People's Experience Offers a Salient Illustration that Marriage Bans Are Sex Discrimination

The term "gay marriage" has been used extensively by the media, the legislature, and the courts. That term is a misnomer, however, because, not all same-sex marriages are between homosexuals: some are between bisexuals. *Baehr v. Lewin*, 852 P.2d 44, 51 n.11 (Haw. 1993). Several concrete examples, illustrate this point.

First, Professor Nancy Marcus explains why a bisexual person's experience under the marriage bans constitutes impermissible sex discrimination:

> One of the clearest illustrations of why the denial of marriage equality is a form of sex discrimination is this: if I were to apply for a marriage license in my state, Indiana, which [then] prohibit[ed] same-sex marriage, and if, in the process, I announced to the clerk issuing marriage licenses that I am bisexual and want to marry a man, my state would allow me to do so. If, on the other hand, I were to approach the clerk with the statement that I am bisexual and want to marry a woman, I would be refused a marriage license. The only thing that would have changed is the sex of the person I want to marry, and not my sexual orientation, which was bisexual all along. Thus, the denial of marriage equality for same-sex couples is a form of sex discrimination, based on the sex of those in the partnership, and not, necessarily, on sexual orientation.

Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After Windsor*, 23 TUL. J.L. & SEXUALITY 17, 59 (2014).[7] This illustration mirrors

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[7] See also, for example, the story of Jean and Toby Adams. Laura McClure, *Same-Sex Family Values*, Salon

the description by Judge Berzon in her *Latta* concurrence of a real-life example of such an exchange with a marriage license bureau:

> When Karen Goody and Karen Vibe [a Nevada plaintiff couple] went to the Washoe County Marriage Bureau to obtain a marriage license, the security officer asked, "Do you have a man with you?" When Karen Vibe said they did not, and explained that she wished to marry Karen Goody, she was told she could not even obtain or complete a marriage license application ... [because] "[t]wo women can't apply" ... [and] marriage is "between a man and a woman."
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> Notably, Goody and Vibe were not asked about their sexual orientation; Vibe was told she was being excluded because of her gender and the gender of her partner.
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> Of course, the reason Vibe wants to marry Goody, one presumes, is due in part to their sexual orientations. But that does not mean the classification at issue is not sex-based.

Latta, 771 F.3d at 481-82 (Berzon, J., concurring) (*see also* previously discussed language in her

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Monday, Oct 20, 2003, http://www.salon.com/2003/10/20/same_sex_marriage/ .

opinion at 482 n.5 and 495, elaborating upon explanation that same-sex marriage is a matter of sex discrimination). These illustrations are more than thought experiments; to be bisexual-inclusive is to recognize that, like gay men and lesbians, many bisexuals enter into lifelong same-sex partnerships, raise children with their same-sex partners, and are equally affected by the denial of equal marital rights and protections for their families.

A second illustration of the sex discrimination embedded in the marriage bans comes in the context of divorce and an attempt to remarry. For example, if a bisexual woman is in a devoted relationship with a man, she may legally marry him. If that bisexual woman later divorces her husband and subsequently falls in love with and enters into a committed relationship with a woman, she would not be allowed to legally marry her female partner in many states. The only difference between the bisexual's first relationship and her second relationship is the sex of her partner.

Finally, the sex discrimination of the marriage bans is thrown into sharp relief when the example of two bisexual couples is considered side-by-side. The first bisexual couple is a man and a woman in a committed relationship who are raising children together. The second bisexual couple is two women in a committed relationship, also raising children together. The first, different-sex bisexual couple may marry under the current laws of Kentucky, Michigan, Ohio, and Tennessee. The second same-sex couple is denied the rights and responsibilities of marriage under the state marriage bans. All four of

the people in these relationships are bisexual, so the denial of rights is dependent on sex of the bisexual's chosen partner.

All of these examples aptly illustrate that, for a bisexual person, the denial of marriage rights is a result of sex discrimination, and not based solely on sexual orientation discrimination.

Not only do same-sex marriage bans on their face employ a form of sex discrimination, but the discriminatory effect of the bans further serves to reinforce gender stereotypes. In discriminating on the basis of the sex of a bisexual woman's chosen partner, for example, a ban on same-sex marriage imposes a gender classification on the bisexual woman by requiring that, as a woman, she must partner with a man, if at all, because that is her role as a woman, taking away her autonomy and volition in the matter, and failing to account for the fact that a bisexual woman, like a lesbian, may also fall in love with a life partner who is also female.[8]

Equal Protection requires that "no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should

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[8] This Court's gender discrimination case law has focused (in addition to the harm of restricting an individual's opportunities based on gender) on the harm inflicted by governmental enforcement of gender stereotypes when it acknowledged that "the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender. . . ." *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (internal citations omitted).

be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982). To trigger this test, plaintiffs claiming a right must show that they are similarly situated to the comparable persons who are receiving the claimed right. The bisexuals in the foregoing examples are treated differently depending on the sex of their partner. And there is no question that a bisexual person who wishes to marry a partner of the same sex is similarly situated to a bisexual person who wishes to marry a partner of the opposite sex. Like the different-sex couple, the same-sex couple (regardless of homosexual or bisexual orientation) is seeking to "affirm their commitment to one another before their children, their family, their friends, and their community" and "live with pride in themselves and their union." *Windsor*, 133 S. Ct. at 2689.

B. This Court Should Follow Those Lower Courts that Have Found that Same-Sex Marriage Bans Impermissibly Categorize According to Sex

Some lower courts have persuasively held that marriage bans categorize according to sex, and constitute sex discrimination.[9] *Amicus* urges this Court to follow the reasoning of these lower courts.

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[9] Furthermore, at least one member of this Court has grappled with this question. Justice Kennedy asked during oral arguments in the *Perry* case: "Do you believe this can be treated as a gender-based classification? . . . It's a difficult question that I've been trying to wrestle with." Perry Oral Arguments, p.13,http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144.pdf. *Amicus* contends that the answer to this question should be a resounding "Yes."

Loving v. Virginia, 388 U.S. 1 (1967), is analogous and supports the application of heightened scrutiny under the sex discrimination framework, notwithstanding that the marriage bans apply equally to men and women. The *Loving* Court struck down Virginia's anti-miscegenation under the Equal Protection Clause and in doing so, rejected the "notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Loving*, 388 U.S. at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (stating equal protection inquiry "does not end with a showing of equal application among the members of the class defined by the legislation"). These principles are not limited to laws which discriminate based on race. The principle of white supremacy, which underlay the laws struck down in *Loving* was not a prerequisite to the application of heightened scrutiny: "[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11, n.11. Thus, under *Loving*, application of intermediate scrutiny to sex classifications—like those embedded in the marriage bans—is proper notwithstanding that the bans (1) apply equally to men and women, and (2) are not expressly based on the principle of maintaining the superiority of men over women. *See, e.g.*, *J.E.B.*, 511 U.S. at 140-42 & 142 n.13 (holding gender-based peremptory strikes of jurors violate equal protection whether exercised against men or women, and even though there was no showing of disproportionate impact on one sex).

Following *Loving*, some cases brought in the 1970s attempted to secure the right to marriage for same-sex couples based on an analogous sex discrimination theory.[10] Although these early cases were unsuccessful, in 1993 the Hawaii Supreme Court accepted the sex discrimination theory in a marriage equality case. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In *Baehr*, a group of same-sex couples filed suit alleging solely that Hawai'i's marriage ban constituted sex discrimination under the Hawai'i Constitution's Equal Protection Clause; the plaintiffs did not assert sexual orientation discrimination. Although the State tried to frame the issue as one of sexual orientation discrimination, the court did not agree and, as a result, did not reach the question of which level of scrutiny should be afforded to sexual orientation discrimination. *Baehr*, 852 P.2d at 52, n.12.

The *Baehr* court held that the statute discriminated on the basis of sex and failed the strict scrutiny applied under Hawai'i's Equal Protection Clause. *Id.* at 66. The court reasoned that the State's marriage ban was impermissible sex discrimination because denying an individual's right to marry a person of the same sex was a classification based solely on sex. In so holding, the court relied on *Loving* to reject the argument that Hawai'i's marriage ban was not sex discrimination because it applied equally to men and women. *Id.* at 67-68. *See also* Justin Reinheimer, *Same-Sex*

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[10] Attempts in Minnesota and in 1971 and Kentucky in 1973 both failed. *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed in *Baker v. Nelson*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis, 21 BERKELEY J. GENDER L. & JUST. 213, 233 (2006).

Although the *Baehr* decision was based on the Hawai'i Constitution, which mandated strict scrutiny for sex discrimination, its reasoning is sound and persuasive and may be applied to the cases at bar. This Court has held that sex is a quasi-suspect class, and the *Baehr* reasoning applies with equal force under an intermediate, rather than strict, scrutiny analysis. Moreover, as described throughout this brief, the bisexual experience puts into sharp relief the lesson from *Baehr* that marriage bans are, at their core, classifications based on sex which fail both intermediate and strict scrutiny. *See also Brause v. Bureau of Vital Statistics*, 1998 WL 88743, *6 (AK Super. Ct. Feb. 27, 1998) ("That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious."), *overruled* by statute; *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (D. Iowa Aug. 30, 2007) (invalidating Iowa's marriage ban on the basis that "such as Plaintiffs . . . may not be denied licenses to marry . . . by reason of the fact that both persons comprising such a couple are of the same sex."), *holding aff'd on other grounds* in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Baker v. State*, 744 A.2d 864, 904-12 (Vt. 1999) (Johnson, J., concurring in part) ("I write separately to state my belief that

this is a straightforward case of sex discrimination. . . .").

Similarly, some lower federal courts have held marriage bans unconstitutional on the ground that such statutes constitute sex discrimination. *See Kitchen v. Herbert*, 961 F. Supp. 2d at 1206 ("[T]he court finds that the fact of equal application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex."), *aff'd on other grounds Kitchen v. Herbert*, 755 F.3d 1193; *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Sexual orientation discrimination can take the form of sex discrimination."), *rev'd Perry v. Brown* 671 F.3d 1052 (9th Cir. 2012), *rev'd Hollingsworth v. Perry*. *See also Latta*, 771 F.3d at 482 n.5 (Berzon, J., concurring) ("[G]ender discrimination analysis is, if anything, a closer fit to the problem before us than the sexual orientation rubric. While the same-sex marriage prohibitions obviously operate to the disadvantage of the people likely to wish to marry someone of the same gender—i.e. lesbians, gay men, bisexuals, and otherwise-identified persons with same-sex attraction—the individuals' actual orientation is irrelevant to the application of the laws."); *Rosenbrahn v. Daugaard*, 2014 WL 6386903, *11 (D. S.D. Nov. 14. 2014) (denying motion to dismiss because "complaint sufficiently states a claim for relief because it plausibly shows a classification related to gender.").

Finally, Justice Scalia has articulated the case for applying a sex discrimination analysis to marriage bans. He has stated:

> [In an] equal-protection challenge . . . [the Texas sodomy statute] does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. . . . [I]t is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

Lawrence, 539 U.S. at 600 (Scalia, J., dissenting). Justice Scalia used this rationale to argue that the sodomy law held unconstitutional in *Lawrence* could not be a violation of equal protection on the basis of sex, because same-sex couples could not, at that time, get married. Because the denial of marriage equality had not yet been found to be a violation of equal protection on the basis of sex, Justice Scalia concluded that sodomy law at issue in *Lawrence* was not unconstitutional sex discrimination. *Id.* However, for all the reasons articulated herein, and by the very logic of Justice Scalia's *Lawrence* dissent, this Court should hold same-sex marriage bans are sex-based classifications that violate equal protection.

Treating marriage bans as a sex-based classification under the Equal Protection Clause is the correct analysis. From a bisexual perspective, *amicus* argues that same-sex marriage bans are facially discriminatory as to sex because the determining factor for whether a bisexual may marry is the sex of one's chosen spouse.

Moreover, the reasoning of those courts that have rejected the sex discrimination theory[11] is unpersuasive, particularly when the lived experiences of bisexuals are brought to light. Once bisexual erasure is reversed, these courts' reasoning falls apart because for bisexuals, the marriage bans do in fact treat individual men and women differently because of their sex, rather than because of their sexual orientation. Because the cases that rejected the sex discrimination theory assumed only two possible orientations—homosexual or heterosexual—they are doctrinally infirm. Applying the same analysis to bisexual persons, the outcome is very different. The right to marry is a right available to a bisexual person but *only* when that bisexual chooses to marry a different-sex partner; that right is *not* available to the bisexual who wishes to marry a

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[11] While other lower courts have rejected the sex discrimination theory advocated herein, *amicus* respectfully disagrees with these opinions to the extent they reject this theory, and urge this Court to accept the sex discrimination theory. *See, e.g., Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004)(analyzing marriage equality based solely on sexual orientation under the Equal Protectio0op-n and Due Process clauses); *In Re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (same); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (same). As noted previously, *amicus* agrees with the other theories supporting marriage equality but focus solely on sex discrimination in this brief. *See* n.3, *supra*.

partner of the same sex. As a result, the sex discrimination theory should be the Court's central analytical framework in the cases at bar, and such framework is further bolstered by the *Loving* analogy: Just as the anti-miscegenation laws impermissibly categorized and discriminated according to race notwithstanding that such laws applied equally to White and to Black individuals, the marriage bans improperly categorize and discriminate according to sex, notwithstanding that such laws apply equally to men and women. *See Loving*, 388 U.S. at 7-8 ("[W]e deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."). *Amicus* argues that the sex discrimination equal protection framework is the most inclusive, accurate, and appropriate and urges the Court to adopt it here.

Moreover, the marriage bans should be stricken under the heightened scrutiny standard applied in sex discrimination cases. Laws alleged to violate substantive due process or equal protection are subject to one of three levels of scrutiny: strict, intermediate, or rational basis. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Heightened scrutiny must be applied when a fundamental right is denied or the classification is suspect or quasi-suspect. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Because marriage statutes constitute sex discrimination, heightened scrutiny applies. *See United States v. Virginia*, 518 U.S. at 519. Where legislation negatively affects a quasi-suspect class

and intermediate scrutiny controls, the classification (here, "sex") is deemed valid only if it is "substantially related to a sufficiently important governmental interest." *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997); *Cleburne*, 473 U.S. 441.

Here, the marriage bans of Kentucky, Michigan, Ohio, and Tennessee fail under an intermediate scrutiny analysis because the classification employed (sex) is not substantially related to an important governmental interest. The Sixth Circuit in this case seemed to find a rational basis for denying same-sex couples and their families protections in a government interest in "encourag[ing] couples to create and maintain stable relationships within which children may flourish." *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014). Even assuming that this were a correct identification of the government's interest in banning same-sex marriage, that interest is not substantially served by denying protections to same-sex couple-headed families with children. As this Court recognized in *Windsor*, however, it is same-sex marriage *bans* that threaten the well-being of children, not the provision of same-sex marriages. *See Windsor*, 133 S. Ct. at 2694 (DOMA "humiliates tens of thousands of children now being raised by same-sex couples [and] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."). *See also* Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle,"* 23 TUL. J.L. & SEXUALITY at 52-57 ("But Think of the Children! (and Other Irrational

Rationalizations")). Thus, the rationales seemingly accepted by the Sixth Circuit fail under any degree of scrutiny, but would most certainly fail under intermediate scrutiny, under which respondents have failed to meet their burden of establishing any substantial relationship between protecting children and denying children of same-sex parents and their parents the myriad of rights and protections that accompany same-sex marriage rights.

This Court recognized in *Romer* and *Lawrence* that gay men and lesbians are entitled to equal dignity and respect for their personal life choices and that they are entitled to live as equal citizens. The Constitution protects bisexuals to the same degree. As the Court continues to recognize the Constitution's related protections for equal liberty, particularly in protecting individual autonomy in intimate associations and personal life choices, bisexuals should be accorded the same respect for their intimate life partnerships as gays and heterosexuals.

CONCLUSION

Amicus respectfully requests that this Court strike down same-sex marriage bans and non-recognition statutes, and that in doing so that it use language that acknowledges the existence of bisexuals and the impact of these bans on bisexuals and their families. While, on the one hand, the fundamental right and liberty interest in marrying the person of one's choice is a long-standing right that should trigger strict scrutiny analysis, *amicus* urges that even were this court to employ a pure equal protection analysis, heightened scrutiny should

apply. While others have argued persuasively that sexual orientation is a classification that warrants strict scrutiny, and *amicus* agrees with that analysis, *amicus* alternatively suggests that heightened scrutiny is warranted for yet another reason. The inclusion of bisexual couples and individuals in marriage equality jurisprudence illustrates that marriage bans constitute sex discrimination, subjecting them to heightened scrutiny. If this Court agrees that a same-sex marriage ban is sex discrimination it must apply, at the very least, intermediate scrutiny. Applying heightened scrutiny on whichever basis, this Court should conclude that same-sex marriage bans and recognition denials are unconstitutional.

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